UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 08-14763-CC

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

KIM CURTISS DANNER
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA

BRIEF OF APPELLANT

THE LAW OFFICE OF
WILLIAM MALLORY KENT

WILLIAM MALLORY KENT
Fla. Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
904-398-8000 Telephone
904-348-3124 Fax
kent@williamkent.com

Counsel for Appellant Danner

NO. 08-14763-CC

UNITED STATES v. KIM CURTISS DANNER

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Magistrate Judge Robert R. Armstrong.

2. Alison Blackwell Austin, Assistant United States Attorney, Sentencing Counsel for the Government.

3. United States District Court Judge U. W. Clemon.

4. Kim Curtiss Danner, Defendant-Appellant.

5. Randall O. Gladden, District Court Counsel for Defendant-Appellant Danner.

6. William Mallory Kent, Sentencing and Appellate Counsel for Defendant-Appellant Danner.

7. Alice H. Martin, Assistant United States Attorney, Trial Counsel for the Government.

8. J. Stephen Salter, District Court Counsel for Defendant-Appellant Danner.

9. Joyce White Vance, Appellate Counsel for the Government.

10. Watson, Jimmerson, Martin, McKinney, Graffeo & Helms, PC, District Court Counsel for Defendant-Appellant Danner.

STATEMENT REGARDING ORAL ARGUMENT

Kim Curtiss Danner requests oral argument. The Court may have questions concerning the multiple sentencing issues as to which oral argument could be helpful.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES - PRIMARY AUTHORITY

CASES - NON PRIMARY AUTHORITY

STATUTES

CONSTITUTIONAL PROVISIONS

SENTENCING GUIDELINES

RULES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the merits issue(s) in this case under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. This Court has jurisdiction over the sentencing issue(s) under the authority of 28 U.S.C. § 3742. The notice of appeal was filed in a timely manner within ten days of rendition of judgment and sentence.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT ERRED IN INCREASING DANNER'S GUIDELINE OFFENSE LEVEL BY FOUR LEVELS UNDER U.S.S.G. § 2K2.1(b)(6), WHEN THAT INCREASE WAS PROHIBITED BY U.S.S.G. § 2K2.4, COMMENT. (n. 4).

II. THE DISTRICT COURT ERRED UNDER THE *DALE-RHYNES* DOCTRINE IN HOLDING DANNER ACCOUNTABLE FOR THE STATUTORY MAXIMUM SENTENCE APPLICABLE TO THE MOST SERIOUS OF THREE DRUGS ALLEGED IN THE INDICTMENT, WHEN THE JURY WAS INSTRUCTED THAT IT MUST CONVICT IF IT FOUND THE EVIDENCE SUFFICIENT FOR *ANY* OF THE THREE CHARGED DRUGS, AND THE GOVERNMENT DID NOT SEEK A SPECIAL VERDICT TO DETERMINE WHICH OF THE THREE DRUGS WERE THE BASIS FOR THE VERDICT.

III. THE DISTRICT COURT ERRED IN MAKING DANNER'S 18 U.S.C. § 924(c) SENTENCE CONSECUTIVE TO HIS SENTENCE FOR VIOLATING 18 U.S.C. § 922(g).

IV. THE DISTRICT COURT ERRED IN APPLYING THE § 851 SENTENCING ENHANCEMENT UNDER THE UNIQUE FACTS OF THIS CASE IN WHICH NEITHER DANNER NOR HIS THEN COUNSEL RECEIVED NOTICE OF THE ELECTRONIC FILING OF THE § 851 INFORMATION.

V. THE DISTRICT COURT ERRED IN DENYING DANNER'S MOTION TO SUPPRESS.

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS[1]

The Grand Jury returned a four-count indictment in the Northern District of Alabama against the defendant. Count one charged that on or about September 5, 2007, the defendant unlawfully possessed with intent to distribute approximately 8 tablets of a mixture and substance containing a detectable amount of oxycodone, approximately 1,585 tablets of a mixture and substance containing a detectable amount of hydrocodone, and approximately 451 tablets of a mixture and substance containing a detectable amount of diazepam, all being controlled substances.

Count two charged that on or about September 5, 2007, the defendant possessed a firearm, a Beretta .40 caliber pistol, a Mossberg 12 gauge shotgun, and a Savage Arms 12 gauge shotgun, in furtherance of a drug trafficking crime.

Count three charged that on or about September 5, 2007, the defendant possessed the following firearms: a Beretta .40 caliber pistol; a Mossberg 12 gauge shotgun; a Savage Arms 12 gauge shotgun; a Savage Arms .22 caliber rifle; and a Street Sweeper shotgun after having been convicted on August 16, 1984 in the United States District Court, Northern District of Alabama for Possession With Intent to Distribute a Controlled Substance and Conspiracy (CR-84-PT-89-NE).

---

[1] The statement of facts is derived from paragraphs 1-9, inclusive, of Danner's PSR unless otherwise noted.

Count four charged that on or about September 5, 2007, the defendant knowingly received and possessed a firearm (a Street Sweeper) as defined by 26 U.S.C. § 5845, which was not registered to him in the National Firearms Registration and Transfer Record.

According to Danner's PSR, the evidence showed that on September 5, 2007, Madison County Sheriff's Deputy Sallis responded to a disabled vehicle off the roadway on Buddy Williamson Road in New Market, Alabama. Deputy Sallis observed that a male, later identified as Michael Jones, had several gunshot wounds. Jones was pronounced dead two hours later.

Witnesses described a car chase between the victim's vehicle and a vehicle similar to that registered to Danner.

A state search warrant was executed at Danner's residence in New Market, Alabama. Deputies recovered a Savage Arms .22 caliber rifle in a rifle case on the west wall of the garage. A loaded Street Sweeper was recovered from the rear engine bay area of a bass boat in the garage. Registration information, which identified Danner as the owner of the boat, was recovered from the boat.

Deputies recovered three firearms from the master bedroom, to include a Beretta .40 caliber pistol, a Mossberg 12 gauge shotgun, and a Savage Arms 12 gauge shotgun. Recovered from inside a safe in the master bedroom closet was

approximately 1,585 tablets of a mixture and substance containing a detectable amount of hydrocodone, approximately 451 tablets of a mixture and substance containing a detectable amount of diazepam, and approximately 8 tablets of a mixture and substance containing a detectable amount of oxycodone, confirmed by the Alabama Department of Forensic Science.

Danner filed a pretrial motion to suppress, which included as Exhibits A and B, respectively, a copy of the search warrant and affidavit for search warrant. [R18] An evidentiary hearing was conducted before the district court, which summarily denied relief at the conclusion of the hearing. [Clerk's minute entry for October 19, 2007; R27-13]

Danner proceeded to trial and was convicted by jury verdict as to counts one, two, and three. He was found not guilty on count four.

Danner was sentenced to 76 months concurrent on each of counts one (the drug offense) and count three (felon in possession of a firearm) and five years consecutive as to both counts one and three on count two, the 924(c) count. [R48]

This appeal followed in a timely manner. [R49] Danner is serving the sentence of imprisonment imposed in this case.

STANDARDS OF REVIEW

The first four issues in this appeal are sentencing issues subject to *de novo* review as questions of law. This is so both as to guideline sentencing issues and non-guideline sentencing issues.

As to guideline issues, this Court applies a two-pronged standard to review claims that the district court erroneously applied sentencing guidelines adjustments. First, the Court reviews the factual findings underlying the district court's sentencing determination for clear error. (Danner is not contesting any fact findings made by the district court.) *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir.2007). Then this Court reviews the court's application of those facts to the guidelines *de novo. Id*. Although the sentencing guidelines are now advisory after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), "district courts are still required to correctly calculate the appropriate advisory guidelines range." *United States v. Livesay*, 484 F.3d 1324, 1329 (11th Cir.2007) (per curiam), cited in *United States v. Williams*, 527 F.3d 1235, 1247 -1248 (11th Cir. 2008).

Sentencing questions involving statutory interpretation are similarly reviewed *de novo*. *United States v. Gilbert*, 130 F.3d 1458, 1461 (11th Cir.1997).

The district court's ruling on the pretrial motion to suppress challenging

insufficient probable cause in search warrant's supporting affidavit also presents a question of law for *de novo* review. *United States v. Butler*, 102 F.3d 1191, 1198 (11th Cir.), cert. denied, 520 U.S. 1219, 117 S.Ct. 1712, 137 L.Ed.2d 836 (1997).

SUMMARY OF ARGUMENTS

I. THE DISTRICT COURT ERRED IN INCREASING DANNER'S GUIDELINE OFFENSE LEVEL BY FOUR LEVELS UNDER U.S.S.G. § 2K2.1(b)(6), WHEN THAT INCREASE WAS PROHIBITED BY U.S.S.G. § 2K2.4, COMMENT. (n. 4).

Danner was convicted of both a § 922(g) felon in possession of a firearm offense, and a § 924(c) possession of a firearm in connection with a drug trafficking offense. He was also convicted on the underlying drug trafficking offense. Ordinarily there would be a four level sentencing guideline increase in the base offense level for the § 922(g) guideline because the gun was possessed in connection with a drug offense, however, U.S.S.G. § 2K2.4, comment. (n. 4), prohibits the four level increase when there is a separate conviction under § 924(c). Danner objected to the four level increase, citing to the district court this Court's controlling authority on this question, *United States v. Brown*, 332 F.3d 1341 (11th Cir. 2003). The district court erred in overruling Danner's objection and he is entitled to resentencing without the four level increase.

II. THE DISTRICT COURT ERRED UNDER THE *DALE-RHYNES* DOCTRINE IN HOLDING DANNER ACCOUNTABLE FOR THE STATUTORY MAXIMUM SENTENCE APPLICABLE TO THE MOST SERIOUS OF THREE DRUGS ALLEGED IN THE INDICTMENT, WHEN THE JURY WAS INSTRUCTED THAT IT MUST CONVICT IF IT FOUND THE EVIDENCE SUFFICIENT FOR *ANY* OF THE THREE CHARGED DRUGS, AND THE GOVERNMENT DID NOT SEEK A SPECIAL VERDICT TO DETERMINE WHICH OF THE THREE DRUGS WERE THE BASIS FOR THE VERDICT.

The *Dale-Rhynes* doctrine holds that if a single drug count alleges multiple controlled substances (of varying statutory maximum penalties as to each drug) is submitted to the jury on a general verdict, which does not require the jury to disclose whether it reached a unanimous verdict on all or only some of the charged controlled substances, is punishable only to the extent of the statutory maximum of the least serious of the multiple drugs in the single count. This Court has adopted the *Dale-Rhynes* holding in *Black v. United States*, 373 F.3d 1140, 1145-1146 (11th Cir. 2004).

Danner was charged in a single count with possession with intent to distribute three separate controlled substances, each of which was subject to varying maximum statutory penalties. The case was submitted to the jury on instructions which required the jury to convict Danner if the jury found he possessed *any* of the three drugs. The jury returned a general verdict.

At sentencing Danner objected to imposition of sentence based on any statutory penalty other than that applicable to the least serious of the three charged drugs, citing

Black to the district court. The district court overruled Danner's objection. The district court erred and Danner is entitled to remand and resentencing on the drug offense in count one based on the statutory maximum penalty applicable to the least serious of the three charged controlled substances.

III. THE DISTRICT COURT ERRED IN MAKING DANNER'S 18 U.S.C. § 924(c) SENTENCE CONSECUTIVE TO HIS SENTENCE FOR VIOLATING 18 U.S.C. § 922(g).

Danner was convicted of a simple felon in possession offense, 18 U.S.C. § 922(g), and possession of a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. § 924(c). He was also convicted of the underlying drug trafficking offense, in violation of 21 U.S.C. § 841. Danner argued that under the statutory language of § 924(c), that the mandatory consecutive sentence it required applied only to the underlying drug offense, not to the parallel felon in possession of a firearm offense. This is appears to be the law of this Circuit, *United States v. Flennory*, 145 F.3d 1264, 1267-1268 (11th Cir. 1998). *Flannery* states that § 924(c)'s consecutive sentence is consecutive only to the underlying crime of violence or drug trafficking offense which is the predicate element of the 924(c) charge, and that a § 922(g) offense is not a crime of violence for this purpose, citing *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir. 1993).

The district court erred in imposing the 924(c) sentence consecutive to both the

underlying drug offense *and* the § 922(g), felon in possession of a firearm offense. Danner's judgment and sentence should be vacated and the case remanded for resentencing with instructions that the § 924(c) sentence be made consecutive solely to the § 841 drug offense (and that for this purpose, to effectuate the intent of Congress as expressed in § 924(c), that the guidelines be determined independently for the § 841(b) and § 922(g) offenses, without regard for the grouping rules of Chapter Three of the guidelines.

IV. THE DISTRICT COURT ERRED IN APPLYING THE § 851 SENTENCING ENHANCEMENT UNDER THE UNIQUE FACTS OF THIS CASE IN WHICH NEITHER DANNER NOR HIS THEN COUNSEL RECEIVED NOTICE OF THE ELECTRONIC FILING OF THE § 851 INFORMATION.

The Government electronically filed a § 851 information to enhance Danner's sentence on Friday, October 5, 2007. [R13] The Government's only service on Danner or his counsel was by means of the district court's electronic filing system, which in the normal course would provide email notification of the filing to Danner's electronically registered counsel who at the time was Randall Gladden. Danner substituted counsel at the very same time the Government filed its information, retaining Bruce Gardner, who filed his notice of appearance the following Tuesday.

Neither Gladden nor Gardner received notice of the Government's filing. Danner presented evidence at sentencing which was undisputed that neither Gladden

nor Gardner knew about the § 851 information and that accordingly neither informed Danner of the filing. Danner first learned of the § 851 information during his PSR interview after having gone to trial.

The Local Rules of the Northern District permit electronic filing and electronic service, subject to the General Order of the Northern District implementing the electronic case management system. The General Order, in turn, provides that electronic service is not sufficient, if a party learns that the attempted service did not reach the person to be served.

Section 851 requires service on the counsel for the defendant. This Court requires strict compliance with the requirements of § 851, including its filing and service requirements. On these facts the district court erred in overruling Danner's objection to the application of the § 851 enhancement to his sentence.

V. THE DISTRICT COURT ERRED IN DENYING DANNER'S MOTION TO SUPPRESS.

The affidavit for the search warrant in this case concededly provided probable cause to search a vehicle in a garage that was a separate, detached structure from the defendant's residence. The affidavit made no attempt to provide a substantial basis for probable cause to search the separate residence. The nexus between be probable cause for the crime and evidence of the crime expected to be found in the vehicle and

the separate, detached residence, was missing. There is a circuit split on the requirement of a substantial basis for the nexus in such cases. The Eleventh Circuit requires a substantial showing of a nexus and does not permit the nexus to be assumed. *United States v. Lockett*, 674 F.2d 843, 846 (11th Cir.1982).

ARGUMENTS

I. THE DISTRICT COURT ERRED IN INCREASING DANNER'S GUIDELINE OFFENSE LEVEL BY FOUR LEVELS UNDER U.S.S.G. § 2K2.1(b)(6), WHEN THAT INCREASE WAS PROHIBITED BY U.S.S.G. § 2K2.4, COMMENT. (n. 4).

Danner was charged in a four count indictment. [R7] Count one charged possession with intent to distribute controlled substances (oxycodone, hydrocodone and diazepam) on September 5, 2007, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and (b)(1)(D), count two charged possession on September 5, 2007 of three firearms in furtherance of the drug trafficking offense alleged in count one, in violation of 18 U.S.C. § 924(c), count three charged possession as a convicted felon on September 5, 2007 of the same three firearms alleged in count two (plus two additional firearms) in violation of 18 U.S.C. § 922(g)(1), and count four charged possession on September 5, 2007 of an unregistered firearm in violation of 26 U.S.C. § 5861(d). The jury found Danner not guilty of count four but guilty of counts one, two and three. [R30]

The presentence investigation report ("PSR") at paragraph 18, page 7, increased Danner's guideline offense level by four levels based on his alleged use of the firearms in connection with another felony offense, that is, the drug trafficking offense under count one:

> 18. Specific Offense Characteristics: Because the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, the base offense level is increased by four levels pursuant to U.S.S.G. § 2K2.1(b)(6). The felony offense is Possession With Intent to Distribute a Controlled Substance.

PSR, ¶ 18, p. 7.

Danner filed written objections to the PSR and in his objections, specifically objected to the four level increase under § 2K2.1(b)(6), noting that the four level enhancement under U.S.S.G. § 2K2.1(b)(6) is prohibited by U.S.S.G. § 2K2.4, comment. (n. 4), and cited *United States v. Brown*, 332 F.3d 1341 (11th Cir. 2003). *Brown* held that the court is *not permitted* to add the four levels in a case in which the defendant is also being sentenced under 18 U.S.C. § 924(c) for possession of the firearm during a drug trafficking offense, because of the double counting prohibition of Application Note 4 of U.S.S.G. § 2K2.4. [R45, p. 5, ¶ 11]

The Probation Officer's addendum to the PSR responded to Danner's objection as follows:

> Probation Officer's Response: The guidelines direct that sentences for counts one and three would be calculated and grouped together pursuant to U.S.S.G. § 3D1.2(c), and count two is grouped separately because the statute requires a separate sentence (See paragraph 15). Count one is Possession With Intent to Distribute Controlled Substances, Count two is Possession of a Firearm in Furtherance of a Drug Trafficking Crime,

> and Count three is Felon in Possession of a Firearm. Count two and count three are basically the same conduct. Therefore, since the firearm guideline was used, then U.S.S.G. § 2K2.1(b)(6) encompasses the distribution of the drugs and this was applied correctly.
>
> The defendant cites *U.S. v. Brown*, 332F.3d 1341 (11th Circuit 2003) as grounds for double counting of firearms pursuant to a four-level increase pursuant to U.S.S.G. § 2K2.1(b)(6). In reviewing this case, the U.S. Supreme Court examined the four-level increase at § 2K2.1(b)(5), not § 2K2.1(b)(6).
>
> No changes were made to the presentence report. This remains an unresolved issue that affects the advisory guideline range.

PSR Addendum, p. 5.

At sentencing Danner reiterated his written objection, advising the district court that the issue was strictly controlled by *Brown*.

> MR. KENT: This is the question of the 4-level increase under 2K2. And there I'm relying upon a case, Eleventh Circuit case, *United States versus Brown*. . . . , which is 332 F.3d 1341, 2003. I think *Brown* is just strictly controlling.

[R53-9]

Danner noted that the Probation Officer's response that *Brown* did not apply because the *Brown* decision involved the application of § 2K2.1(b)(5), not § 2K2.1(b)(6), was mistaken, because § (b)(6) of the current guideline was the same as was had been numbered (b)(5) at the time of the *Brown* decision. In other words, *Brown* in fact involved the application of the very same provision:

> [MR. KENT] Now, the probation officer in the addendum noted that the *Brown* case referred to a different subsection, I think number 5, instead of number 6, of 2K2.1. But what happened is after *Brown*, 2K2 was amended; and what was number 5 is now number 6, so that case is strictly controlling.

[R53-10]

When asked for its response, the Government, had nothing to offer beyond the probation officer's response:

> MRS. AUSTIN: The government has nothing to offer in addition to the probation officer's response.

[R53-10]

Without further discussion or explanation the district court overruled Danner's objection. [R53-10] The district court then sentenced Danner to 76 months imprisonment on each of counts one and three and a *consecutive*, minimum mandatory 60 months on count two, for a total sentence of 136 months imprisonment. [R53-27; R48]

The district court erred in overruling Danner's objection to the four level increase under U.S.S.G. § 2K2.1(b)(6), based on this Court's decision in *Brown*. *Brown* stated the issue as follows:

> The issue is whether Amendment 599 and the current version of U.S.S.G. § 2K2.4 preclude the application of a § 2K2.1(b)(5) four-level enhancement for possession of a firearm in connection with another

> felony offense to Brown's § 922(g) conviction for being a felon in possession of a firearm, when he was also sentenced for his § 924(c) conviction for using or carrying firearms during and in relation to a drug trafficking offense. Brown argues that the § 2K2.1(b)(5) enhancement to his § 922(g) conviction is "double counting" because he also received a consecutive sentence for his § 924(c) conviction, which in effect punished him for the same conduct-possession of a firearm during and in relation to a felony drug trafficking crime.

United States v. Brown, 332 F.3d 1341, 1343 (11th Cir. 2003).

This is the identical issue presented by Danner's case. U.S.S.G. § 2K2.1(b)(5) was subseqently renumbered November 1, 2006 and is now § 2K2.1(b)(6). "Section 2K2.1(b) is amended by redesignating subdivisions (5) and (6) as subdivisions (6) and (7), respectively;" U.S.S.G. Appendix C, November 1, 2006, Amendment 691.

The Probation Office, Government and district court erred by distinguishing *Brown* on the basis that *Brown* applied U.S.S.G. § 2K2.1(b)(5) instead of § 2K2.1(b)(6), because (b)(5) as it was at the time of the *Brown* decision is the same provision as the current (b)(6) applied to Danner. *Brown* explains why U.S.S.G. § 2K2.4, comment. (n. 4), prohibits the addition of four levels.

When a defendant is convicted under § 922(g) of being a felon in possession of a firearm, the applicable sentencing guideline is § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). Section 2K2.1(a) contains several base offense

levels and requires that the greatest applicable base offense level be applied. A § 922(g) conviction warrants a base offense level of 20 under § 2K2.1(a)(4)(A), which applies if "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense." In addition, § 2K2.1(b) provides specific offense characteristics, which enhance the offense level for the covered offenses. Section 2K2.1(b)(6) increases the offense level by 4 "[i]f the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense."

When a defendant is convicted under § 924(c), for possessing a firearm in relation to a drug crime, the relevant sentencing guideline is § 2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), which provides that the statutory sixty-month consecutive sentence must be imposed. U.S.S.G. § 2K2.4(a). Application Note 4 of the Commentary to § 2K2.4 provides certain instances when specific offense characteristics regarding explosives or firearms are not to be applied to the base offense level for other convictions.[2]

[2] In the 2002 Sentencing Guidelines, Application Note 2 was changed to what is now Application Note 4. The *Brown* decision referenced Note 2 but explained that subsequent to the briefing had been redesignated Note 4.

Prior to Amendment 599, the relevant portion of U.S.S.G. § 2K2.4 Application Note 2 provided that "[w]here a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use or discharge of an explosive or firearm ... is not to be applied in respect to the guideline for the underlying offense." U.S.S.G. § 2K2.4 comment. (n. 2) (1998).

In *United States v. Flennory,* this Court interpreted the term "underlying offense" to mean "crime of violence" or "drug trafficking offense," the two explicit bases for a § 924(c) conviction. 145 F.3d 1264, 1268-69 (11th Cir.1998). In *Flennory,* the defendant was convicted under § 922(g) and § 924(c) and received an enhancement derived from cross-referencing under § 2K2.1(c)(1), which was applied because it would result in a greater sentence than the § 2K2.1(b)(6) enhancement. This Court at that time refused to expand the definition of underlying offense beyond "crime of violence" or "drug trafficking offense" for purposes of sentencing a § 924(c) violation and applying § 2K2.4 Application Note 2. *Id.* at 1268-69 (citing *United States v. Sanders,* 982 F.2d 4 (1st Cir.1992), and declining to follow *United States v. Vincent,* 20 F.3d 229 (6th Cir.1994)). *Flennory* held that § 2K2.4 Application Note 2 (now Note 4) did not apply because a § 922(g) conviction was not an "underlying offense" within the definition of the note and, therefore, the §

2K2.1(c)(1) cross-referencing enhancement was not double counting the conduct punished by the § 924(c)consecutive sentence. *Flennory,* 145 F.3d at 1269.

But as this Court noted in *Brown*, effective November 2000, Amendment 599 to the Sentencing Guidelines changed the language of Application Note 4, which now provides, in pertinent part:

> If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense . . .
>
> If the explosive or weapon that was possessed, brandished, used, or discharged in the course of the underlying offense also results in a conviction that would subject the defendant to an enhancement under §2K1.3(b)(3) (pertaining to possession of explosive material in connection with another felony offense) or §2K2.1(b)(6) (pertaining to possession of any firearm or ammunition in connection with another felony offense), do not apply that enhancement. A sentence under this guideline accounts for the conduct covered by these enhancements because of the relatedness of that conduct to the conduct that forms the basis for the conviction under 18 U.S.C. § 844(h), § 924(c) or § 929(a). For example, if in addition to a conviction for an underlying offense of armed bank robbery, the defendant was convicted of being a felon in possession under 18 U.S.C. § 922(g), the enhancement under §2K2.1(b)(6) would not apply.

U.S.S.G. § 2K2.4, comment. (n. 4).

The language of the commentary is unambiguous. The first sentence of Application Note 4 reads: "If a sentence under this guideline is imposed *in conjunction with a sentence for an underlying offense,* do not apply any specific offense characteristics for possession ... of ... [a] firearm *when determining the sentence for the underlying offense.*." U.S.S.G. § 2K2.4, comment. (n. 4) (emphasis added). This language remains unchanged from the prior Application Note 2. *United States v. Diaz,* 248 F.3d 1065, 1106-07 (11th Cir.2001) ("The first sentence of the new application now reinforces what courts have always known-when a defendant is convicted of a § 924(c) violation and an underlying offense, the defendant's possession of a weapon cannot be used to enhance the level of the underlying offense.") (recognizing that the amended language now included relevant conduct of jointly undertaken criminal activity, thus an enhancement based upon a co-defendant's weapon possession was prohibited).

By amending Application Note 2 (now Note 4), the Sentencing Commission sought to "(1) avoid unwarranted disparity and duplicative punishment; and (2) conform application of guideline weapon enhancements with general guideline principles." Amend. 599, Reason for Amendment, U.S.S.G. App. C at 72.

As this Court held in *Brown*, Amendment 599 abrogated *Flennory* to the extent that the new application note expanded the definition of underlying offense to include

the relevant conduct punishable under U.S.S.G. § 1B1.3. *Diaz,* 248 F.3d at 1107 (citing the amended language of § 2K2.4 Application Note 2 to hold that "relevant conduct cannot be used to enhance the offense level of the underlying offense."). The Sentencing Commission cited *Flennory* in its Reason for Amendment and explained that the Eleventh Circuit's narrow interpretation was underinclusive of the circumstances in which the application note applies to prohibit double counting.

The amended language of Application Note 4 continued beyond the revisions to the first paragraph and added a second paragraph which specifically provides that if the weapon possessed "*in the course of* the underlying offense *also results in a conviction* that would subject the defendant to an enhancement under ...§ 2K2.1(b)(6)..., do not apply that enhancement." U.S.S.G. § 2K2.4 comment. (n. 4) (2007) (emphasis added).

The weapons possessed by Danner in the course of the underlying drug trafficking offense resulted in his conviction under § 922(g), therefore, the § 2K2.1(b)(6) enhancement cannot be applied. Furthermore, the Reason for Amendment states that, in addition to prohibiting weapons enhancements to the underlying offense, "this amendment also expands the application note to clarify that offenders who receive a sentence under § 2K2.4 should not receive enhancements under ...§ 2K2.1(b)(6)... with respect to any *weapon ... connected to the offense*

underlying the count of conviction sentenced under § 2K2.4."Amend. 599, Reason for Amendment, U.S.S.G. App. C at 72 (emphasis added).

As stated in the Reason for Amendment, Amendment 599 "is intended to avoid the duplicative punishment that results when sentences are increased under both the statutes and the guidelines for *substantially the same* harm." *Id.* (emphasis added). In other words, the Sentencing Commission has chosen to equate the wrongs being punished by a § 2K2.1(b)(5) enhancement and a § 924(c) sentence and require the election of one or the other. The commission perceived the conduct normally embraced by a § 2K2.1(b)(6) enhancement to be sufficiently punished by the § 924(c) sentence and has amended the sentencing guidelines to prevent a defendant from being punished twice for "substantially the same harm." *Id.*

Pursuant to the unambiguous language of U.S.S.G. § 2K2.4, comment. (n. 4), the § 2K2.1(b)(6) enhancement applied to Danner's § 922(g) conviction and Danner's sentence for his § 924(c) conviction punishes twice the same wrong of possessing a firearm in connection with the underlying felony of drug trafficking. Application Note 4 explicitly prohibits the assessment of the § 2K2.1(b)(6) enhancement to the § 922(g) conviction under these circumstances. Accordingly, the district court erred in increasing Danner's guideline offense level by four levels under § 2K2.1(b)(6).

The guideline range as determined by the district court was 70-87 months

based on the four level increase under U.S.S.G. § 2K2.1. The district court sentenced Danner at the bottom third of that range, 76 months. The corrected range reduced four levels would be 48-57 months. A sentence at the bottom of that range would be 48 months and a sentence at the top of that range would be 57 months, which is well outside the 76 month sentence actually imposed. The error affected Danner's substantial rights and is not harmless, because the sentence was not imposed at a point of an overlapping guideline range, nor did the district court state that it would have imposed the same sentence irrespective of the guideline range. *United States v. Pielago*, 135 F.3d 703, 714, n. 1 (11th Cir. 1998) (vacating sentence for resentencing even when sentence fell within range of corrected guideline because district court did not state it would have imposed the same sentence).

Therefore this Court should vacate Danner's judgment and sentence and remand the case to the district court for resentencing under the corrected guideline range.

II. THE DISTRICT COURT ERRED UNDER THE *DALE-RHYNES* DOCTRINE IN HOLDING DANNER ACCOUNTABLE FOR THE STATUTORY MAXIMUM SENTENCE APPLICABLE TO THE MOST SERIOUS OF THREE DRUGS ALLEGED IN THE INDICTMENT, WHEN THE JURY WAS INSTRUCTED THAT IT MUST CONVICT IF IT FOUND THE EVIDENCE SUFFICIENT FOR *ANY* OF THE THREE CHARGED DRUGS, AND THE GOVERNMENT DID NOT SEEK A SPECIAL VERDICT TO DETERMINE WHICH OF THE THREE DRUGS WERE THE BASIS FOR THE VERDICT.

The maximum penalty for the drug offense charged in count one is three years imprisonment without an enhancement under 21 U.S.C. § 851 (and we argue below that no § 851 enhancement should apply), or six years with the § 851 enhancement. The reason for this maximum penalty is that count one charged possession with intent to distribute three separate substances, one of which was punishable under 21 § 841(b)(1)(C), one punishable under § 841(b)(1)(D)(1), and one punishable under § 841(b)(1)(D)(2).

The jury instructions in this case expressly told the jury to convict if they found that Danner possessed any one of the three drugs. The jury was instructed that they were not required to find that Danner possessed all three drugs.

> Count One of the indictment charges the defendant with possession of controlled substances with the intent to distribute them. Title 21, Section 841(a)(l) of the United States Code, the laws of the United States, makes it a federal crime for anyone to possess a controlled substance with the intent to distribute it. I charge you that Oxycodone, Hydrocodone, and Diazepam are all controlled substances within the meaning of that law.

> Now, the defendant can be found guilty of this crime outlined in the first count of the indictment only if two things are proved beyond a reasonable doubt: First, that *he knowingly and willfully possessed Oxycodone, Hydrocodone, or Diazepam*, <u>or any of them</u>, all of them, as charged in Count One of the indictment. Second, that when he possessed *the substance or substance* [*sic*, substances, plural], he had the intent to distribute them.
>
> To possess with intent to distribute simply means to possess with the intent to deliver or transfer possession of a controlled substance to another person with or without any financial interest in the transaction.
>
> So in order to prove the defendant guilty of Count One, *the Government has to prove that the defendant possessed* <u>at least one</u> or all of the substances, and it has to prove that when he possessed the substances he intended to distribute them.

[R59-43-44; emphasis supplied]

The jury verdict form did not require a special verdict as to the particular drug the jury had found that Danner possessed.[3] [R30]

The result of this is that Danner is only accountable for sentencing purposes for the least severely punishable drug. To hold Danner accountable for the penalty applicable to the most serious of the three drugs constitutes what is commonly referred to as a *Dale-Rhynes* violation.

In *Edwards v. United States*, 523 U.S. 511, 513 (1998), the defendants argued that, because the trial judge had instructed the jury that a guilty verdict could be based

---

[3] The Government bears the burden of seeking a special verdict. *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir.1998).

on a conspiracy[4] that involved either cocaine or crack, the sentencing court was required to assume that the conspiracy had involved the controlled substance with the least severe penalty and to sentence them accordingly. The Supreme Court rejected the argument because the sentencing guidelines instruct the judge "to determine both the amount and the kind of 'controlled substance' for which a defendant should be accountable." Id. at 513-14. The Court went on to state that "regardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require the judge to determine [the controlled substance] at issue." Id. at 514.

In *dicta*, however, and without any supporting analysis, the *Edwards* Court added that the defendants' "statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy." 523 U.S. at 515.

> Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG § 5G1.1. But, as the Government points out, the sentences imposed here were within the statutory limits applicable to a cocaine-only conspiracy, given the quantities of that drug attributed to each petitioner. Brief for United States 15-16, and nn. 6-7; see 21 U.S.C. §§ 841(b)(1)-(3); App. 42-47, 72-82, 107-112, 136-141, 163-169 (cocaine attributed to each

[4] Although Danner was charged with possession with intent to distribute, not conspiracy, that strengthens rather than weakens the argument.

> petitioner). Cf. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-1084 (C.A.2 1984) (court may not sentence defendant under statutory penalties for cocaine conspiracy when jury may have found only marijuana conspiracy).

Edwards v. United States, 523 U.S. 511, 515, 118 S.Ct. 1475, 1477 - 1478 (1998).

Because the *Edwards* defendants' sentences fell within the statutory maximum for a cocaine-only conspiracy, the Court did not address the matter further. Id. Nonetheless, relying on this *dicta*, several circuits have decided that, when a general verdict is submitted in connection with a conspiracy involving more than one controlled substance charged in the conjunctive, the punishment imposed cannot exceed the maximum punishment for the substance with the lowest maximum penalty. *United States v. Rhynes*, 206 F.3d 349, 379-81 (4th Cir. 1999); *United States v. Dale*, 178 F.3d 429, 432 & n.1 (6th Cir. 1999) (citing cases); *United States v. Barnes*, 158 F.3d 662, 668-71 (2d Cir. 1998); see also *United States v. Fisher*, 22 F.3d 574, 576 (5th Cir. 1994) (pre-*Edwards* case with same resolution).

The Eleventh Circuit appears to have adopted the position that the *dicta* in *Edwards* was in fact a holding, if not when made, then in light of statements in and the holding of *Apprendi*:

> Subsequently, of course, the Supreme Court appears to have stated that the *Edwards* discussion of differing statutory maximum sentences was in fact a holding of the case in a footnote to *Apprendi v. New Jersey*, 530 U.S. 466, 497 n. 21, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

. . .

> As an initial matter, the question before us is not whether or not Edwards was binding law, but whether a failure to refer to Edwards in 1998 would render counsel's performance to fall below standards of objective reasonableness. Further, the holding in *Allen* effectively made the dictum, or holding, of *Edwards* the law of this circuit. *United States v. Allen*, 302 F.3d 1260 (11th Cir.2002).
>
> Further, *Apprendi* now requires that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490 120 S.Ct. 2348. Moreover, as this court made clear in *Allen*, the hypothetical position laid out in *Edwards* and *Riley* was in fact the law of the circuit. *United States v. Allen*, 302 F.3d 1260, 1274-75 (11th Cir.2002).

Black v. United States, 373 F.3d 1140, 1145-1146 (11th Cir. 2004).

Accordingly, the maximum statutory penalty for count one is the § 841(b)(1)(D)(2) three year penalty.

The district court imposed a 76 month sentence of imprisonment on count one and imposed a six year term of supervised release. The sentence of imprisonment imposed exceeded the statutory maximum under *Dale-Rhynes*. Additionally, because the maximum statutory term of imprisonment was three years, the maximum term of supervised release is one year, not six years. 21 U.S.C. § 841(b)(1)(D)(2). This is because the offense becomes a Class E felony under 18 U.S.C. § 3559, which limits the maximum term of supervised release to one year under 18 U.S.C. 3583(b)(3).

Accordingly, this Court should vacate the judgment and sentence and remand the case for resentencing with instructions that count one must be resentenced to no more than three years imprisonment and one year supervised release.[5]

[5] If the Section 851 enhancement were upheld the term of supervised release would be limited to two years.

III. THE DISTRICT COURT ERRED IN MAKING DANNER'S 18 U.S.C. § 924(c) SENTENCE CONSECUTIVE TO HIS SENTENCE FOR VIOLATING 18 U.S.C. § 922(g).

The five year sentence for the 924(c) offense in count two was imposed consecutive to the 76 month sentence for counts one (the § 841(b) drug offense) and three (the § 922(g) gun offense). Instead, it should only have been made consecutive to the drug offense in count one.

This is because 924(c) by its own terms requires a mandatory consecutive sentence only as to the underlying drug trafficking offense (or crime of violence), not to other offenses in general.

> Section 924(c)(1) imposes a mandatory five-year sentence for using or carrying a firearm "in relation to any *crime of violence or drug trafficking crime*." 18 U.S.C. § 924(c)(1) (emphasis added). Count Five of the indictment expressly alleged the drug trafficking charged in Count Four as the underlying offense. We note also that possession of a firearm by a felon is not a "crime of violence" as that term is used in § 924(c)(3). See *United States v. Canon*, 993 F.2d 1439, 1441 (9th Cir.1993) (holding that "possession of a firearm by a felon is not a 'crime of violence' under § 924(c)").

United States v. Flennory, 145 F.3d 1264, 1267-1268 (11th Cir. 1998) (superseded in part on other grounds by the amendment to U.S.S.G. § 2K2.4, comment. (n. 4) as applied by *United States v. Brown, supra*) (footnote omitted).

Danner argued below and renews his argument here that the § 924(c) five year sentence under count two can only be imposed consecutive to the three year

maximum drug offense in count one, and must be run *concurrent* to the sentence imposed on count three under 18 U.S.C. § 922(g).

This Court should vacate Danner's judgment and sentence and remand for resentencing in consideration of the arguments made herein as follows:

The total offense level for count three, the 922(g) count, should be reduced four levels based on the *Brown* argument above, which would result in an adjusted guideline range based on total offense level of 22 instead of 26. Given Danner's criminal history category II, the sentencing range for count three would be 46-57 months.

Count two, the 924(c) count would receive a five year sentence, however, it would be concurrent to count three, the 922(g) count, and consecutive only to the underlying drug trafficking offense in count one.

The sentence on count one should have been imposed pursuant to the PSR's calculation for count one, which was 8-14 months.[6]

---

[6] The PSR calculated the offense level under U.S.S.G. § 2D1.1 for count one to be level 10. PSR, ¶ 15. Level 10, category II, yields a range of 8-14 months. The Government did not argue below that the grouping rule of Chapter 3 of the Guidelines would trump Congress's mandate that the consecutive sentence apply *only* to the underlying drug crime or crime of violence. That is, in the ordinary case the § 922(g) offense would be grouped with the § 841(b) offense and the sentencing guideline range for the two offenses would be the same and run concurrent to one another. Danner argued below, however, that in order to properly effectuate the purpose of the consecutive sentence requirement, the two offenses, § 841(b) and § 922(g) would be

In sum, the sentencing package on remand would be a total of not more than 68-74 months, applied 8-14 months on count one, followed by 60 months consecutive on count two, together with a concurrent 46-57 month sentence on count three.

---

viewed separately and the five year mandatory consecutive sentence under § 924(c) would apply only to the guideline range applicable to the drug count alone. To do otherwise would be to frustrate the intent of Congress which is clearly expressed in the statutory language of § 924(c). To the extent a guideline provision - in this case the grouping rules - are inconsistent with the statutory language, the statute controls.

IV. THE DISTRICT COURT ERRED IN APPLYING THE § 851 SENTENCING ENHANCEMENT UNDER THE UNIQUE FACTS OF THIS CASE IN WHICH NEITHER DANNER NOR HIS THEN COUNSEL RECEIVED NOTICE OF THE ELECTRONIC FILING OF THE § 851 INFORMATION.

The Government filed its information under 21 U.S.C. § 851 providing notice of intent to rely upon a prior drug conviction to increase the statutory maximum penalty in this case as to the drug count, count one, on Friday, October 5, 2007. [R13] The certificate of service on that document shows service to attorney Randall Gladden *by electronic service only* that same day.[7] While this was taking place, Danner was substituting counsel and attorney Bruce A. Gardner filed his notice of appearance on Tuesday, October 9, 2007, the very next docket entry. [R14]

Attorney Gardner was not aware and had no actual knowledge of the § 851 notice until the probation officer brought it to Danner's attention *after the trial during the PSR interview*. Danner immediately called his sister, Penny Edwards, to have her

---

[7] The Rule 5.4 of the Local Rules of the United States District Court for the Northern District of Alabama provides:

LR5.4 Service of Documents By Electronic Means

Documents may be served through the court's transmission facilities by electronic means to the extent and in the manner authorized by the court's General Order regarding Electronic Case Filing Policies and Procedures. Transmission by the Notice of Electronic Filing constitutes service the filed document upon each party in the case who is registered as a Filing User.

ask Mr. Gardner what this was about. Penny Edwards communicated with Mr. Gardner's office through her daughter, Kristy Edwards, by email and received the following response:

> -----Original Message-----
>
> From: Monna Harmon [mailto:monna@gardnerlaw.org]
>
> Sent: Wednesday, March 12, 2008 2:03 PM
>
> To: Kristi Edwards
>
> Subject: Re: Kim Danner
>
> Kristi:
>
> I found the motion online. We were never served with a copy of it because it was filed on October 5, 2007 and we entered our appearance on October 9, 2007. The motion was served upon Randy Gladden, who was Kim's counsel at the time. Nowhere in the discovery packets we've received was there ever mention, or a copy, of that motion. I have scanned it and attached it hereto.
>
> Additionally, Bruce is on his way back from Guntersville. I've informed him the situation and he should be in touch with someone about it shortly.
>
> -Monna

[R45-¶ 35, pp. 7-8]

At sentencing Danner proffered the testimony of attorney Gardner, who was present at counsel table, and an affidavit from attorney Gladden, both of whom

confirmed that neither had any actual notice of the § 851 information and accordingly neither counsel had ever informed Danner of the § 851 filing.

> And what it [Danner's objection to the § 851 enhancement] has to do with is, of record, Mr. Danner was represented by Randy Gladden on [Friday] October 5th, 2007. And the government filed an 851 Notice of -- Information of Prior Drug Conviction on October 5th, 2007.
>
> But as a practical matter, Mr. Gladden considered himself terminated from the case, although -- because he had been discharged by the client and the client had hired Mr. Gardner who is standing here beside us -- Mr. Gladden, though, had not been relieved by the Court from his duty of representing Mr. Danner. But, Mr. Gladden did not read the e-mail electronic notice; or, if there was a written notice, the 851 notice; wasn't aware of it, didn't tell Mr. Gardner about it, didn't tell Mr. Danner about it. On October 9th, the following week -- and I think the 5th may have been a Friday and the 9th may have been a Tuesday – Mr. Gardner filed his notice of appearance. And Mr. Gardner is prepared to testify that he didn't go back in the docket and discover the 851 notice, and so he was not actually aware of it, and he never told Mr. Danner.
>
> I have a -- so I have Mr. Gardner prepared to testify he was not himself aware of the 851 notice until he got the presentence report, and neither was Mr. Danner -- and I have an affidavit from Mr. Gladden to the same effect that he wasn't aware of it until I brought it to his attention. May I file the affidavit, Your Honor?
>
> THE COURT: Yes.
>
> MR. KENT: And this is a -- I wouldn't say an entirely academic issue -- but if the Court stays within the guideline range, the 851 enhancement would only increase the statutory maximum; that does trigger some -- it affects the term of supervised release, it affects -- I'm not sure what else -- but the key thing would be it affects the term of supervised release. There's a mandatory 6-year term with the enhancement.

THE COURT: Right.

[R53-13-14]

Under these circumstances, when neither Mr. Danner nor his counsel had actual notice of the § 851 information, it is improper to hold the defendant accountable for the enhanced penalty.

This Circuit and all circuits strictly construe the filing and *service* requirements of 21 U.S.C.§ 851, which provides:

> (1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (*and serves a copy of such information on the person or counsel for the person*) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1) (emphasis supplied).

Although Rule 5.4 of the Local Rules of the Northern District of Alabama permitted electronic filing, the Local Rule was expressly subject to the General Order of the Northern District implementing the new electronic filing system. The Northern District's General Order 2004-1 (8/18/2004) provides at paragraph 9(E), that "Service by electronic means is not effective if the party making service learns that the

attempted service did not reach the person to be served."

It is undisputed that the electronic filing did not reach either counsel for Danner, and we would ask this Court to remand Danner's case for resentencing without application of the § 851 enhancement.

V. THE DISTRICT COURT ERRED IN DENYING DANNER'S MOTION TO SUPPRESS.

Danner filed a pretrial motion to suppress challenging the search of his residence and attached garage, which included as Exhibits A and B, respectively, a copy of the state search warrant and affidavit for search warrant which had supplied the basis for the search. [R18] An evidentiary hearing was conducted before the district court, which summarily denied relief at the conclusion of the hearing. [Clerk's minute entry for October 19, 2007; R27-13]

During the course of argument after the evidentiary hearing, counsel for Danner conceded that the search warrant affidavit provided probable cause to search the *vehicle* identified as having been seen in the detached garage, but argued that there was no evidentiary basis in the affidavit to support the search of the *separate residence*. [R27-9-12]

> [MR. GARDNER (Defense Counsel)] I would be willing to concede that within the parameters of the affidavit there would be sufficient probable cause to search Mr. Danner's vehicle.
> But it goes on to make a leap at the end, Your Honor, that in particular, he says: "Based on the aforementioned facts, I have reason to believe that the firearms," which is the subject of the matter, as well as some other things, "are contained in the vehicle *or the residence* of Mr. Danner."
>
> THE COURT: Yes.
>
> MR. GARDNER: *And my point is that there's insufficient facts to --*

within the parameters of the affidavit to make the leap to the residence.

[R27-9-10; emphasis supplied]

In response the Government argued that "firearms are mobile objects; that if the vehicle is found parked in the defendant's garage at his residence, it's not a stretch for - - beyond anyone's imagination to assume that Mr. Danner, when he returned home, took the firearm that possibly was used to kill Mickey Jones and brought it inside his residence." [R27-11-12] The Government objected to the defense attempt at the evidentiary hearing to examine the affiant on this point. The Government noted that Judge Hamilton, the state court judge who had authorized the search warrant and who had testified at the evidentiary hearing, did not offer any testimony that she had questioned the affiant beyond the scope of the affidavit itself; that is, there was nothing in the record to show that the state judge who authorized the warrant had taken any testimony from the affiant to the effect that firearms are mobile and could have been transferred from the vehicle to the residence. [R27-12-13]

The district court agreed and observed that "that's almost susceptible to judicial notice." [R27-13] Without any statement of reasons beyond this observation the district court orally denied the motion to suppress. [R27-13] The district court did not enter a written order explaining its reasoning. [Clerk's minute entry for November 19, 2007]

The search warrant affidavit read as follows:

ON 9-5-07 I RESPONDED TO INVESTIGATE THE HOMICIDE OF MICHAEL JONES AKA MICKEY JONES. THE HOMICIDE TOOK PLACE IN NORTH MADISON COUNTY. IT APPEARS THAT JONES WAS IN HIS VEHICLE BEING PURSUED BY A MAROON SUV WITH BRIGHT CHROME RIMS. HE WAS PURSUED ON PHILLIPS RD. JB WALKER RD. AND FINALLY CRASHED AT BUDDY WILLIAMSON RD. WEST OF J B WALKER RD. DURING THIS PURSUIT THE PRELIMINARY INVESTIGATION REVEALED THAT JONES WAS SHOT SEVERAL TIMES WITH A RIFLE TYPE WEAPON POSSIBLE OF THE 7.62 CALIBER OR A SHOTGUN-MANY OF THESE TYPE SHELLS WERE LOCATED ALONG THE PATH OF THE PURSUIT. I THEN SPOKE TO A CONFIDENTIAL INFORMANT THAT ADVISED ME THAT KIM DANNER WHO LIVES IN THIS AREA MADE COMMENTS IN THE PAST THAT HE WOULD KILL MICKEY JONES. THE CI ALSO ADVISED THAT KIM DANNER WAS IN POSSESSION OF A MAROON YUKON WITH BRIGHT CHROME RIMS. I THEN HAD OTHER INVESTIGATORS BEGIN TO SEARCH FOR WITNESSES AND POSSIBLE LEADS. A WITNESS ON PHILLIPS RD. ADVISED THAT SHE HEARD SEVERAL GUN SHOTS AND SHORTLY AFTER OBSERVED A SILVER PICK UP TRUCK, MICHAEL JONES VEHICLE, BEING PURSUED BY A MAROON SUV TYPE VEHICLE OR TRUCK WITH A CAMPER SHELL PASS IN FRONT OF HER HOUSE .THE WITNESS FURTHER STATED THAT SHE HEARD APPROXIMATELY 10 MORE GUN SHOTS IN THE AREA OF THE INTERSECTION OF PHILLIPS RD. AND JB WALKER RD. ANOTHER WITNESS IN THE AREA OF JB WALKER ADVISED THAT THEY HEARD 3 GUN SHOTS AND OBSERVED A LARGE SUV TYPE VEHICLE MAROON IN COLOR WITH LARGE CHROME WHEELS PULLING FROM THE STOP SIGN GOING SOUTH ON JB WALKER IN FRONT OF 'IHIS VEHICLE WAS A WHITE OR SILVER TRUCK OR VAN. THIS VEHICLE IS BELIEVED TO BE MICHAEL JONES VEHICLE. INV. JOHN HALL HAD RECEIVED INFORMATION FROM INV. PATTERSON VIA SGT. ZEISSLER THAT KIM DANNER WAS A SUSPECT IN THIS

CASE AND HE LIVED IN THE AREA OF BUILT-RIGHT MANUFACTURING .SGT SALOMONSKY LOCATED THE RESIDENCE THAT BELONGED TO KIM DANNER AT 983 J B WALKER. THEY EXITED THEIR VEHICLE AND WALKED DOWN THE DRIVEWAY. THEY MET WITH KIM DANNER IN THE REAR OF THE RESIDENCE. SGT. SALOMONSKY IDENTIFIED HIMSELF AND ADVISED KIM DANNER THAAN [*sic*] INVESTIGATOR NEEDED TO TALK HIM ABOUT THE AN INCIDENT. HE AGREED TO GO WITH US AND BE INTERVIEWED. SGT. SALOMONSKY ASKED IF HE WANTED HIM TO CLOSE THE GARAGE DOOR. DANNER RESPONDED YES AND DIRECTED SALOMONSKY WHERE THE CLOSING BUTTONS WERE IN THE GARAGE. UPON ENTERING THE GARAGE SALOMONSKY OBSERVED A MAROON SUV VEHICLE WITH A MISSING TAG AND A SET OF GLOVES ON THE BUMPER THE VEHICLE HAD A SET OF BRIGHT CHROME WHEELS ON IT. DANNER RODE TO CID WITH INV. HALL. INV FREE AND WHISANTE THEN WENT T0 MEET WITH ANOTHER WITNESS WHO OBSERVED THE SILVER IN COLOR TRUCK BEING FOLLOWED BY A PURPLE IN COLOR CHEVROLET SUV WITH BRIGHT CHROME WHEELS. BASED ON THE INVESTIGATION TO THIS POINT WRITER BELIEVES THAT THE TRUCK BELONGS TO THE VICTIM MICHAEL JONES AND THE MAROON OR PURPLE SUV BELONGS TO KIM DANNER THE TWO VEHICLES PASSED THE WITNESS AT A HIGH RATE OF SPEED IN THE AREA OF BUDDY WILLIAMSON AND JB WALKER THE WITNESS WAS THEN PRESENTED WITH A PHOTO LINEUP CONTAINING KIM DANNERS PHOTOGRAPH THE WITNESS OBSERVED THE LINE UP AND ADVISED THAT KIM DANNER PICTURE MOST LOOKS LIKE THE DRIVER 0F THE. MAROON OR PURPLE SUV MORE THAN THE OTHERS C0NTAINED IN TH PHOTO LINE UP. BASED ON THE AFOREMENTIONED FACTS WRITE BELIEVES THAT THE MAROON IN COLOR SUV TYPE VEHICLE THAT WAS USED IN THE HOMICIDE OF MICHAEL JONES AND THE FIREARMS USED TO MURDER MICHAEL JONES ARE CONTAINED IN THE RESIDENCE AND VEHICLE OF KIM DANNER AT 983 J B

> WALKER RD, NEW MARKET AL 35761. A PUBLIC RECORDS CHECK REVEALED THAT THE UTILITIES AT THIS RESIDENCE ARE REGISTERED TO KIM CURTISS DANNER. HE ALSO HAS A 2003 CHEVROLET TAHOE LS REGISTERED TO THIS ADDRESS. THE EVENTS HAVE TAKEN PLACE IN THE LAST 13 HOURS OF APPLYING FOR THIS SEARCH WARRANT.

[R18-Exhibit B]

What is noticeable lacking from this affidavit is the information commonly found in such affidavits, that is, that the affiant alleges that based on his training and experience in similar investigations it is common to find that firearms and or ammunition which were in a suspect's vehicle would likely be taken from the vehicle and secreted in the owner's residence. It was impermissible for the court to simply assume this connection without some supporting evidence, even were it nothing more than the officer's sworn allegation based on training and experience. It is not something that the district court can simply supply by "judicial notice."

The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,...." The protections of personal privacy and property embodied in the amendment require that probable cause "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1947). For the magistrate to be able to properly

perform this official function, the affidavit presented must contain adequate supporting facts about the underlying circumstances to show that probable cause exists for the issuance of the warrant. *Whiteley v. Warden*, 401 U.S. 560, 564, 91 S.Ct. 1031, 1034-35 (1971); *Nathanson v. United States*, 290 U.S. 41, 47, 54 S.Ct. 11, 13 (1933). The information presented must be sufficient to allow the issuing magistrate to independently determine probable cause; "his action cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333 (1983).

The warrant in this case failed to make any connection between the residence to be searched and the facts of criminal activity that the officer set out in his affidavit. In order to establish probable cause, however, "[t]here must ... be a 'nexus between the place to be searched and the evidence sought.'" *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir. 2004) (quoting *United States v. Van Shutters*, 163 F.3d 331, 336 (6th Cir.1998)). The affidavit was lacking in the required substantial basis for concluding that there was probable cause to issue the warrant as to the residence. See *e.g.*, *Carpenter, 360 F.3d at 594* (affidavit that described marijuana field near residence to be searched and road that ran nearby "fall[s] short of establishing required nexus"); *Van Shutters*, 163 F.3d at 336-38 (no probable cause where warrant affidavit failed to state a nexus between the premises and the criminal activity);

United States v. Schultz, 14 F.3d 1093, 1097 (6th Cir.1994) (no probable cause for warrant where affidavit lacked an "evidentiary nexus ... between the [place to be searched] and the criminal activity").

There appears to be a split among the circuits as to whether probable cause can be inferred from circumstances such as the one in the instant case. The Fifth, Sixth, Eighth, and Ninth Circuits have held that the nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence. *United States v. Jacobs*, 715 F.2d 1343, 1346 (9th Cir.1983) (it was reasonable for the magistrate to conclude that articles of clothing would remain at the residence); *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir.1975) (people who own pistols generally keep them at home or on their persons); *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir.1975), cert. denied, 423 U.S. 825, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975) (it was reasonable to assume that individuals keep weapons in their homes); *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir.1973) (a very likely place to find the pistols would either be on the persons of the assailants or about the premises where they lived).

In contrast, the Eleventh Circuit has held that there must be a "substantial basis" to conclude that the instrumentalities of the crime will be discovered on the searched premises. *United States v. Lockett*, 674 F.2d 843, 846 (11th Cir.1982). See

also *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir.1979) (there is nothing in the affidavit from which a factual finding could be made that the gun used in the shooting was located at defendant's premises); and *United States v. Flanagan*, 423 F.2d 745 (5th Cir. 1970) (search of home suppressed based on arrest of defendant in possession of stolen goods and some goods stolen in burglary still missing).

Danner's case is governed by the nexus principles of *Lockett* and *Flanagan* which require a substantial showing of the nexus between the crime and the place searched. That showing could not be supplied by an after the fact assumption without supporting evidence.

Nor is the Government is permitted a *Leon* good faith exception (*United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984)) to uphold the search, because the affidavit was completely lacking in probable cause to search the residence. The *Leon* Court noted four specific situations where the good faith reliance exception was inappropriate: first, if the issuing magistrate "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," id. at 914, 104 S.Ct. at 3416; second, if "the issuing magistrate wholly abandoned his judicial role," id.; third, if the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," id. at 915, 104 S.Ct. at 3416-17 (citations omitted), or in other

words, where "the warrant application was supported by [nothing] more than a 'bare bones' affidavit," id.; and, fourth, if the "warrant may be so facially deficient-i.e., failing to particularize the place to be searched or the things to be seized ...," id. at 923, 104 S.Ct. at 3421 (citations omitted). The affidavit in Danner's case falls under the third exception to *Leon*.

Accordingly, the district court erred in denying the motion to suppress the evidence seized in Danner's residence. That evidence consisted of drugs and guns, all of which were found in Danner's residence.[8] [R58-66-68] Without that evidence there would have been insufficient evidence to convict Danner on counts one, two and three, therefore Danner's judgment and sentence on all three counts must be vacated.

[8] The only evidence found in the garage where the vehicle was located was the gun charged in count four, the street-sweeper, as to which the jury returned a not guilty verdict. [R58-66-68]

CONCLUSION

Appellant Kim Curtiss Danner respectfully requests this honorable Court vacate his judgment and sentence and remand the case to the District Court for a new trial, or in the alternative that the case be remanded for resentencing consistent with the arguments presented herein.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

_____

WILLIAM MALLORY KENT
Florida Bar Number 260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000 Telephone
904-348-3124 Fax
kent@williamkent.com

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 11,929 words. Under Rule 32(a) the brief is permitted to have 14,000 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Joyce White Vance, Esquire, Assistant United States Attorney, Office of the United States Attorney, 1801 4th Avenue North, Birmingham, Alabama 35203-2101, by United States Postal Service, first class mail, postage prepaid, this 10th day of November, 2008.

_____

William Mallory Kent